

***United States Court of Appeals  
for the Second Circuit***



**INTERVENOR'S  
BRIEF**



76-4187

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

OFFICE OF COMMUNICATION OF THE UNITED )  
CHURCH OF CHRIST, NATIONAL URBAN LEAGUE, )  
NATIONAL ASSOCIATION FOR THE ADVANCEMENT )  
OF COLORED PEOPLE, COMMUNICATIONS COM- )  
MISSION OF THE NATIONAL COUNCIL OF THE )  
CHURCHES OF CHRIST IN THE USA, and )  
UNDA-USA, )

Petitioners, )

v. )

No. 76-4187

FEDERAL COMMUNICATIONS COMMISSION )  
and UNITED STATES OF AMERICA, )

Respondents, )

NATIONAL BLACK MEDIA COALITION, )  
NATIONAL ORGANIZATION FOR WOMEN, )  
BOSTON BROADCASTERS, INC., and )  
AMERICAN BROADCASTING COMPANIES, INC., )

Intervenors. )

ON PETITION FOR REVIEW OF AN ORDER OF  
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF INTERVENOR  
BOSTON BROADCASTERS, INC.

Benito Gaguine

Herbert M. Schulkind

Howard J. Braun

Eric S. Kravetz

FLY, SHUEBRUK, BLUME, GAGUINE  
BOROS and SCHULKIND  
1211 Connecticut Avenue, NW  
Washington, D.C. 20036  
(202) 293-1280

Counsel for Intervenor  
Boston Broadcasters, Inc.

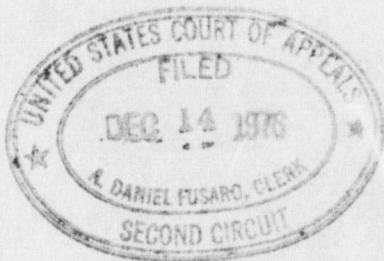


TABLE OF CONTENTS

	<u>PAGE</u>
PRELIMINARY STATEMENT.....	1
INTERVENOR'S INTEREST HEREIN.....	2
ARGUMENT.....	4
I. THE COMMISSION'S ACTION IN ESTABLISHING A TEN EMPLOYEE MINIMUM TO INVOKE ITS EEO REPORTING REQUIREMENTS IS ARBITRARY AND CAPRICIOUS.....	4
II. THE COMMISSION'S EEO REQUIREMENTS SHOULD BE EXPANDED TO INCLUDE NON-DISCRIMINATION ON THE BASIS OF AGE, THE POSTING AT THE STATION ITSELF OF JOB OPENINGS, AND INFORMATION CONCERNING THE TERMINATION OF EMPLOYEES.....	7
CONCLUSION.....	9



TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>STATUTES:</u>	
<u>Administrative Procedure Act</u>	
5 U.S.C. §706.....	7
<u>RULES AND REGULATIONS OF THE FCC, 47 CFR (1976)</u>	
Sections 43.125, 73.301, 73.599, 73.680 and	
73.793.....	5
<u>CASES:</u>	
<u>Columbia Broadcasting System, Inc. v. FCC,</u>	
454 F.2d 1018 (D.C. Cir. 1971).....	5
<u>Greater Boston Television Corp. v. FCC,</u>	
444 F.2d 841 (D.C. Cir. 1970), <u>cert. denied</u> ,	
403 U.S. 923 (1971).....	7
<u>Scenic Hudson Preservation Conf. v. FPC,</u>	
354 F.2d 608 (2nd Cir. 1965).....	7

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

OFFICE OF COMMUNICATION OF THE UNITED )  
CHURCH OF CHRIST, NATIONAL URBAN LEAGUE, )  
NATIONAL ASSOCIATION FOR THE ADVANCEMENT )  
OF COLORED PEOPLE, COMMUNICATIONS COM- )  
MISSION OF THE NATIONAL COUNCIL OF THE )  
CHURCHES OF CHRIST IN THE USA, and )  
UNDA-USA, )

Petitioners, )

No. 76-4187

v. )

FEDERAL COMMUNICATIONS COMMISSION )  
and UNITED STATES OF AMERICA, )

Respondents, )

NATIONAL BLACK MEDIA COALITION, )  
NATIONAL ORGANIZATION FOR WOMEN, )  
BOSTON BROADCASTERS, INC., )  
AMERICAN BROADCASTING COMPANIES, INC., )

Intervenors. )

PETITION FOR REVIEW OF AN ORDER OF  
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR  
BOSTON BROADCASTERS, INC.

PRELIMINARY STATEMENT

Boston Broadcasters, Inc. ("BBI"), Intervenor herein,  
agrees with and thus adopts the Statement of the Issues of  
Petitioners Office of Communication of the United Church  
of Christ, et al. ("Petitioners"). In order to avoid unnecessary  
repetition BBI also adopts the factual recitation included in



Petitioner's Statement of the Case.

INTERVENOR'S INTEREST HEREIN

BBI is the licensee of television station WCVB-TV, an ABC network affiliate, operating on Channel 5 in Boston, Massachusetts. BBI participated fully as a party below and filed Comments herein because of its deep-rooted commitment and concern for equal employment opportunities of all persons, regardless of race, color, creed, sex, age or national origin. Indeed, as reflected in BBI's Form 395 (Annual Employment Report) filed with the Federal Communications Commission on May 11, 1976, WCVB-TV has a full time staff of 258 employees, of whom 25% (65 persons) are female and 16.6% (43 persons) belong to minority groups.

The reasons for WCVB-TV's success in hiring qualified female and minority employees has been a combination of (1) a clearly stated and well communicated Equal Employment Opportunity Policy statement; and (2) an equally clear statement of an Affirmative Action Program. These programs are under the direct supervision of the President of BBI, with monitoring and enforcement by management level personnel at the station itself. Moreover, WCVB-TV has a full-time Personnel Manager and EEO officer to enforce the licensee's EEO policies and to assure upward mobility for women and minorities.

As part of WCVB-TV's regular procedures, each supervisor must prepare an employee evaluation report and an employee utilization report concerning each subordinate and must discuss this report with the employee involved. Moreover, WCVB-TV's management personnel must file quarterly reports with the President giving (a) names, sex, and minority status (if determinable) and action taken on all applicants for positions; (b) names, sex and minority status of all transfers and promotions; and (c) names, sex and minority status of all terminations, whether voluntary or involuntary, including reasons for termination.

In addition, WCVB-TV participates in the training of some minority and female employees each year, hires minority interns to work at the station for 6 to 8 weeks, contributes to the tuition of employees seeking additional education in work-related areas, and supports scholarships for minorities at four colleges and universities with communications departments or schools.

These clearly articulated policies, combined with the personal involvement of corporate officers and station management in reviewing personnel performance and the hiring and termination activities at the station have led to WCVB-TV's success in the area of minority and female employment. WCVB-TV's other activities are designed to help all employees



do a better job while ensuring that a large number of qualified applicants--including females and minorities--will be available for each job opening or promotion which becomes available. BBI thus believes that its practical experience and success in the area of female and minority employment will be of material assistance to the Court in evaluating the action now under review.

ARGUMENT

I. THE COMMISSION'S ACTION IN ESTABLISHING  
A TEN EMPLOYEE MINIMUM TO INVOKE ITS EEO  
REPORTING REQUIREMENTS IS ARBITRARY AND  
CAPRICIOUS.

In the Order under review herein, the Commission concluded that the threshold of its EEO reporting requirements should be raised so that only broadcast stations with over ten full-time employees would be required to file an Equal Employment Opportunity program with the Commission, or to demonstrate that they have complied with fair employment standards and practices by filing detailed Annual Employment Reports with the Agency. Such action, in effect, doubled the number of broadcast stations previously exempt from the Commission's EEO reporting requirements. The Commission based its new rules on its conclusions that small stations have no need for EEO guidelines, and that EEO programs would be unduly burdensome for them. Additionally, the Commission held that



the majority of the broadcast industry's workforce are employed at stations with more than ten full-time employees. (Order, para. 37). See also 47 CFR §§73.125, 73.301, 73.599, 73.680 and 73.793.

BBI strongly believes that, as Petitioners have fully and cogently argued, the Commission's action was arbitrary and capricious since there was no record basis for the conclusions reached by the Agency. More specifically, there was no evidence buttressing the Commission's conclusions that maintenance of an EEO program and the reporting of employment practices in connection therewith is burdensome to stations with between five and ten employees. (Order, para. 37). There is also no record evidence that the hiring practices of smaller broadcast stations are such that EEO programs and standards are no longer necessary, as the Commission determined Ibid. Finally, there is no evidence that it is unimportant, as the Commission implied, to evaluate performance or enforce EEO standards at a station simply because that station is small, where over one-half of all broadcast licensees fall within that category. Ibid. In short, there is no corroborating basis in the record below for the conclusions reached by the Commission. Accordingly, the Commission's action herein is fatally defective and a remand is warranted. Columbia Broadcasting System v. FCC, 454 F.2d 1018 (D.C. Cir. 1971).

Contrary to the Commission's rationale, it would not be burdensome for a station with between five and ten full-time employees to prepare and file an EEO program with the Commission. Indeed, at the same time the Commission eliminated all EEO requirements for such stations, asserting that preparation and submission of an EEO policy would be too burdensome, the agency established a model EEO program for stations having over ten full-time employees which simply can be adopted by a licensee.<sup>1/</sup> The only research really required by such licensee to comply with the model EEO program involves completion of Item VI on the "Availability Survey" (See Attachment A) which information concerns the minority and female workforce in a licensee's recruitment area, and is readily obtainable from the appropriate state employment agency. Since there is no longer any real burden upon a licensee to prepare and submit an EEO policy statement to the Commission as a result of the Commission's own action herein, no rational basis thus exists for the Commission's exclusion from its EEO policy requirements of stations with between five and ten full-time employees.

It also would not be burdensome for a licensee with between five and ten full-time employees to establish its compliance with the Commission's EEO policy. Such a station can easily provide pertinent information relating to hirings, promotions, terminations, and the sex and minority status of

---

<sup>1/</sup> A copy of the Commission's model EEO program is annexed hereto as Attachment A.



its employees, since such information is readily available and would involve only a very few employees.

In conclusion, a requirement that a licensee with between five and ten full-time employees file information with the Commission concerning its EEO policy and the implementation thereof, will not be burdensome. In this respect, the Commission's unsupported conclusions to the contrary cannot withstand judicial scrutiny. Moreover, such a requirement will encourage licensees to undertake affirmative and continuing EEO actions, consistent with the paramount public interest.

Equal opportunity in employment, in BBI's view, is simply too important a matter of national concern to limit its enforcement to less than one-half of this country's broadcast stations. Yet, the Commission's action under review herein would do just that. It is thus respectfully submitted that the Court hold unlawful and set aside the Commission's Order sub judice as arbitrary, capricious, and an abuse of agency discretion. See 5 U.S.C. §706; Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir., 1970), cert. denied, 403 U.S. 923 (1971); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2nd Cir., 1965).

II. THE COMMISSION'S EEO REQUIREMENTS SHOULD BE EXPANDED TO INCLUDE NON-DISCRIMINATION ON THE BASIS OF AGE, THE POSTING AT THE STATION ITSELF OF JOB OPENINGS, AND INFORMATION CONCERNING THE TERMINATION OF EMPLOYEES.

---

As demonstrated above, the Commission's EEO program and reporting requirement should be applicable to the majority of broadcasters rather than less than half of them. In addition, while adoption of the Commission's model EEO program is commendable, such program does not go far enough. Specifically, it neglects several vital areas where discrimination is likely to occur, as BBI urged below.

First, the present policy of the Equal Employment Opportunity Commission (EEOC) is to prohibit age discrimination in employment practices. However, the Commission's model EEO program makes no mention of age, even though other forms of discrimination in hiring are specifically prohibited. Accordingly, BBI urges that age be included as one of the factors listed in the "General Policy" section of the Commission's Model EEO Program referred to in footnote 1, supra.

Second, the section of the Commission's Model EEO Program on "Recruitment" (IV) lacks an important item, viz., a requirement that a licensee's present employees be given the opportunity to apply for job openings. Without such a requirement, there may never be an opportunity for upward mobility of minorities and women from within a licensee's organization.



BBI has therefore suggested to the Commission, albeit unsuccessfully, that an item be added to Section IV of the model EEO program providing that job openings be posted on all information boards and/or other conspicuous places at the station and licensee's offices at the same time that other avenues for seeking applicants are pursued by the licensee.

Finally, terminations, as well as hirings and promotions, may be influenced by the minority group or sex of the employee. This is expressly recognized by the Commission in the first paragraph of its model EEO program referred to in footnote 1, supra. BBI accordingly proposed to the Commission that its model EEO program be modified to include a section dealing with terminations, where the number of voluntary and involuntary terminations would be reported along with the number of minority group members and females involved in each of the two categories. Notwithstanding, this argument too was ignored by the Commission. Therefore, upon remand, this Court should direct the Commission to make the appropriate findings on these questions as required by law. See Greater Boston Television Corp. v. FCC, supra.

#### CONCLUSION

BBI firmly believes that it is necessary to maintain a licensee's awareness of EEO standards and policies and to make licensees to which those standards apply accountable to



the Commission for their employment decisions. The Commission, by limiting the applicability of equal employment standards to a minority of broadcast licensees and by excluding information which should have been required from those to whom its policies apply, has acted in a manner arbitrary, capricious and inconsistent with the public interest. BBI therefore supports Petitioners' request that this Court remand the Commission's Order under review herein with instructions to reopen the proceeding below, and to consider the matters raised herein in order to reach an outcome consistent with the relevant facts and pertinent policy considerations.

-11-

Respectfully submitted,

Benito Gaguine

Herbert M. Schulkind

Howard J. Braun

Eric S. Kravetz

FLY, SHUEBRUK, BLUME, GAGUINE  
BOROS and SCHULKIND  
1211 Connecticut Avenue, NW  
Washington, D.C. 20036  
(202) 293-1280

Counsel for Intervenors  
Boston Broadcasters, Inc.

December 3, 1976



MODEL EQUAL EMPLOYMENT OPPORTUNITY PROGRAM

I General Policy

It is our policy to provide equal employment opportunity to all qualified individuals without regard to their race, color, religion, national origin or sex in all personnel actions including recruitment, evaluation, selection, promotion, compensation, training and termination.

It is also our policy to promote the realization of equal employment opportunity through a positive, continuing program of specific practices designed to ensure the full realization of equal employment opportunity without regard to race, color, religion, national origin or sex.

To make this policy effective, and to ensure conformance with the Rules and Regulations of the Federal Communications Commission, we have developed an Equal Employment Opportunity Program which includes the following elements:

II Responsibility for Implementation

(Name \_\_\_\_\_ Title), is responsible for the administration and implementation of our Equal Employment Opportunity Program. It is also the responsibility of all persons making employment decisions with respect to recruitment, evaluation, selection, promotion, compensation, training and termination of employees to ensure that our policy and program is adhered to and that no person is discriminated against in employment because of race, color, religion, national origin or sex.

III Policy Dissemination

To assure that all members of the staff are cognizant of our equal employment opportunity policy and their individual responsibilities in carrying out this policy, the following communication efforts are made:

- ( ) The station's employment application form contains a notice informing prospective employees that discrimination because of race, color, religion, national origin or sex is prohibited and that they may notify the appropriate local, state, or federal agency if they believe they have been the victims of discrimination.
- ( ) Appropriate notices are posted informing applicants and employees that the station is an Equal Opportunity Employer and of their right to notify an appropriate local, state, or federal agency if they believe they have been the victim of discrimination.

- ( ) We seek the cooperation of the unions represented at the station to help implement our EEO program and all union contracts contain a nondiscrimination clause.
- ( ) Other (Specify)

---



---



---

#### IV Recruitment

To ensure nondiscrimination in relation to minorities and women, and to foster their full consideration in filling job vacancies, we utilize the following recruitment procedures:

- ( ) We attempt to maintain systematic communication, both orally and in writing, with a variety of minority and women organizations to encourage the referral of qualified minority and female applicants. Examples of such organizations contacted during the past twelve months are:

Organization/Source	Number of Referrals
<hr/>	<hr/>
<hr/>	<hr/>
<hr/>	<hr/>
<hr/>	<hr/>
<hr/>	<hr/>
<hr/>	<hr/>
<hr/>	<hr/>

- ( ) In addition to the organizations noted above, which specialize in minority and women candidates, we deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex. Examples of these employment referral services contacted during the past twelve months and the number of referrals are:

<hr/>	<hr/>
<hr/>	<hr/>
<hr/>	<hr/>



- ( ) When we recruit prospective employees from educational institutions such recruitment efforts include area schools and colleges with significant minority and female enrollments. Educational institutions contacted for recruitment purposes during the past twelve months and the number of referrals are:

\_\_\_\_\_

\_\_\_\_\_

- ( ) When utilizing media for recruitment purposes, help-wanted advertisements always include a notice that we are an Equal Opportunity Employer and contain no indication, either explicit or implied, of a preference for one sex over another.

- ( ) When we place employment advertisements in printed media some of such advertisements are placed in media which have significant circulation or are of particular interest to minorities and women. Examples of publications utilized during the past twelve months and the number of referrals are:

\_\_\_\_\_

\_\_\_\_\_

- ( ) We encourage present employees, particularly minority and female employees, to refer minority and female candidates for existing and future job openings.

#### V. Training

- ( ) Station resources and or needs are such that we are unable or do not choose to institute specific programs for upgrading the skills of employees.
- ( ) We provide on-the-job training to upgrade the skills of employees. Tangible benefits of such training to minority and women employees during the past 12 months may be briefly described as follows:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_



- ( ) We provide assistance to students, schools or colleges in programs designed to enable minorities and women to compete in the broadcast employment market on an equitable basis:

<u>Schools or Other Beneficiary</u>	<u>Form of Assistance</u>
_____	_____
_____	_____
_____	_____

- ( ) Other (Specify)

\_\_\_\_\_  
\_\_\_\_\_

#### VI. Availability Survey

Based on information derived from \_\_\_\_\_,  
the respective minority and female workforce in the station's recruitment area  
is as follows:

<u>Women</u>	<u>Blacks</u>	<u>Oriental</u>	<u>Am. Indian</u>	<u>Spanish-Surnamed</u>
--------------	---------------	-----------------	-------------------	-------------------------

Percentage in  
the Workforce

NOTE: The Following To Be Used Only If Workforce Data Is Unavailable.

Based on information derived from \_\_\_\_\_,  
the respective minority and female population in the station's recruitment area  
is as follows:

<u>Women</u>	<u>Blacks</u>	<u>Oriental</u>	<u>Am. Indian</u>	<u>Spanish-Surnamed</u>
--------------	---------------	-----------------	-------------------	-------------------------

Percentage in  
the Population

The above information is for: ( ) S.M.S.A. ( ) City ( ) County

( ) Other (Specify)

#### VII. Current Employment Survey

A. To be completed by stations with less than 50 full-time employees.

- ( ) There has been no change in our employment profile since  
the filing of our most recent Annual Employment Report.
- ( ) There has been a change in our employment profile since  
the filing of our last Annual Employment Report. Attached

is an updated report identifying the incumbents under each FCC Form 395 job category for the two week period beginning \_\_\_\_\_ and ending \_\_\_\_\_.

B. To be completed by stations with 50 or ore full-time employees.

- ( ) Attached as Exhibit No. VII B is a survey of our workforce showing a list of all job titles within each FCC Form 395 category and showing the number of incumbents who are male, female, Black, Spanish-Surnamed American, Oriental, and American Indian.

#### VIII. Job Hires

During the twelve month period beginning (Month - Day - Year) and ending (Month - Day - Year), we hired a total of ( ) persons of whom ( ) were minorities and ( ) were women.

- ( ) An analysis of our recruitment techniques, job applications, and new hires suggests that a sufficient number of qualified minorities and women (are) (are not) applying for available positions.
- ( ) We are expanding our recruitment sources to include:

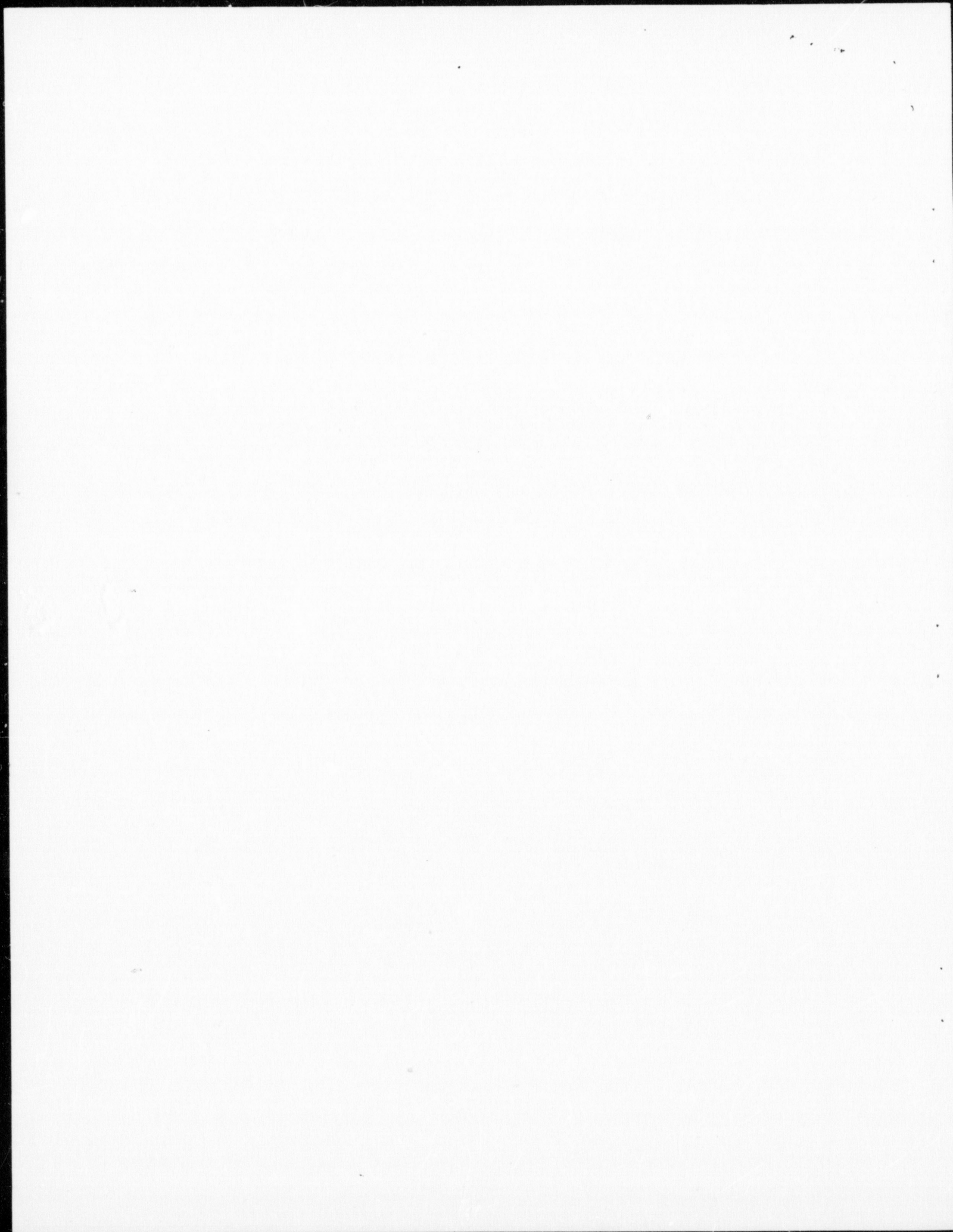
#### IX. Promotion

It is our policy to provide promotions on a nondiscriminatory basis. Further, to assure that minorities and women are given due consideration for promotional opportunities, special effort is taken to encourage minorities and women to qualify and apply for advancement. During the past twelve months our policy has had the following results:

#### X. Effectiveness of Affirmative Action Plan

/This section should contain a brief narrative discussion of the effectiveness of the station's efforts to ensure Equal Employment Opportunity. For example, the licensee might compare the percentage of minority employees in its own workforce with the percentage of minority persons in the licensee's labor market, also setting forth information which suggests that discrepancies which may exist are not unreasonable. The licensee may also explain any difficulties it has experienced in implementing its affirmative action plan, together with any steps it proposes to take to surmount these difficulties in the future./





CERTIFICATE OF SERVICE

I, Patricia Haynes, hereby certify that I have this third day of December, 1976, caused to be delivered via First Class Mail, a copy of the foregoing "Brief of Intervenor Boston Broadcasters, Inc." to the following:

Werner Hartenberger, Esq.  
General Counsel  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554  
Counsel for Respondent, FCC

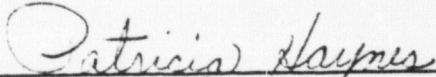
Barry Grossman, Esq.  
Department of Justice  
Washington, D.C. 20530  
Counsel for Respondent, USA

Nolan A. Bowie, Esq.  
Citizens Communications Center  
1914 Sunderland Place, N.W.  
Washington, D.C. 20036  
Counsel for Intervenor  
National Black Media Coalition

Collot Guerard, Esq.  
Media Access Project  
1912 N Street, N.W.  
Washington, D.C. 20036  
Counsel for Intervenor  
National Organization for Women

Ellen Shaw Agress, Esq.  
Earle K. Moore, Esq.  
Moore, Berson & Lifflander  
555 Madison Avenue  
New York, New York 10022  
Counsel for Petitioners

Carl R. Ramey, Esq.  
McKenna, Wilkinson & Kittner  
1150 - 17th Stteet, N.W.  
Washington, D.C. 20036  
Counsel for Intervenor American  
Broadcasting Companies, Inc.

  
\_\_\_\_\_  
Patricia Haynes